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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 398

FOUNDERS GENERAL CORPORATION,
Petitioner, and *Plaintiff-Appellant* below,

against

JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Respondent, and *Defendant-Appellee* below.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

ROYAL E. T. RIGGS,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, FOUNDERS GENERAL CORPORATION, a Maryland Corporation, respectfully shows:

I

Summary statement of the matter involved.

This was an action at law to recover $4,733.33 with interest alleged to have been erroneously assessed and

collected as a stamp tax under Schedule A, Subdivision (3) of Section 800 of the Revenue Act of 1926, upon the alleged transfer of the petitioner's right to receive certain shares of capital stock subscribed for by the petitioner, the certificate representing which was issued in the name of petitioner's nominee but delivered to the petitioner.

That section, hereinafter quoted in full, purported to impose a stamp tax upon the transfers of *"legal title to* shares or certificates of stock * * * in any corporation, *or to rights to subscribe for or to receive such shares or certificates,* whether made upon or shown by the books of the corporation, or by any assignment in blank * * * or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not." (Italics ours.)

No complaint is made as to the amount of the tax, if the transaction herein referred to is taxable. The government claims that the tax is due upon the "invisible transfer" of the right to receive the shares from the subscriber to its nominee. The petitioner insists that there was no transfer of anything to its nominee which was taxable under the statute.

The petitioner paid the tax under protest, filed a claim for refund which was rejected and brought suit to recover the tax so paid.

The United States Attorney for the Southern District of New York, attorney for the defendant, moved to dismiss the complaint pursuant to Section 280 of the New York State Civil Practice Act and Rule 106 of the Rules of Civil Practice of the Supreme Court of the State of New York on the grounds that the petitioner's complaint did not state

facts sufficient to constitute a cause of action (Record, p. 25). This motion came on to be heard before United States District Judge Henry W. Goddard, and after argument and submission of briefs, Judge Goddard handed down an opinion granting the motion to dismiss the complaint (Opinion of Goddard, U.S.D.J., Record, p. 27). Thereupon an order was entered dismissing the complaint and judgment was likewise entered dismissing the complaint (Order, Record, p. 34; Judgment, Record, p. 36). An appeal was taken by petitioner from the order and judgment dismissing the complaint, and after argument the United States Circuit Court of Appeals for the Second Circuit delivered an opinion affirming the judgment of the court below (Record, p. 45).

Facts

The motion to dismiss the complaint was made under the New York Rules of Civil Practice above referred to, and for the purposes of the motion the facts set forth in petitioner's complaint must be accepted as the facts of the case. These may be briefly summarized as follows:

1. On September 10, 1929, petitioner entered into a written agreement with United States Electric Power Corporation to subscribe for 100,000 shares of Common Stock of United States Electric Power Corporation at a price of $13.50 per share, each share having certain attached warrants, such stock and warrants being hereafter referred to as "stock". By the terms of the subscription, payment was to be made by the petitioner on September 17, 1929 (Record, fols. 9, 10).

2. Prior to the time set for delivery, petitioner directed United States Electric Power Corporation to

issue its certificates representing said 100,000 shares of stock in the name of Benton & Co., petitioner's nominee (fol. 11).

The name of Benton & Co., the nominee, was used simply for the convenience of the petitioner in connection with future sales and transfers of stock to the public.

3. Benton & Co. was a partnership organized pursuant to a written agreement dated March 31, 1928 (Exhibit A attached to the complaint; fols. 25-27). The partners were all employees of petitioner, and the partnership continued only so long as they were employees (fol. 34). The purpose of the partnership was to enter into a contract with the petitioner, and the business of the partnership was limited to the holding in the firm name of stocks, bonds, notes and other security and property *"as agent for the account of"* the petitioner (fol. 28). The partnership could perform no other business. It had no capital. Neither the partnership nor any member thereof had or could claim "any beneficial interest whatsoever in any stocks * * * at any time held by the partnership"; and further, "All *right, title,* equity, interest, lien, claim and demand whatsoever in and to any stocks, bonds, notes and other securities and property at any time held or received or receivable by the partnership * * * are hereby irrevocably waived and disclaimed" (fols. 44-46).

4. The partnership entered into a written agreement with the petifioner (Exhibit B attached to the complaint; fols. 39-52) wherein the petitioner appointed the partnership its agent "for the limited purpose of holding in the firm name stocks, bonds, notes and other securities and property as agent (other than commission agent or broker) for the account of the corporation" (fol. 41).

NOTE: References are to pages in Record.

The partnership was to receive $1,500 a year for its services as agent (fol. 42). By this agreement neither the partnership nor any member thereof could claim any beneficial interest whatsoever in any stocks, bonds or other securities at any time held by the partnership and "All *right, title,* equity, interest, lien, claim and demand whatsoever in and to any stocks, bonds, notes and other securities and property at any time held or received or receivable by the partnership * * * are hereby irrevocably waived and disclaimed by said firm and each and every member thereof" (fols. 45, 46). The partnership appointed the petitioner its attorney-in-fact for the purpose of endorsing any securities registered in the partnership name (fol. 48).

Benton & Co. also agreed to deliver on demand of the petitioner all assignments, powers of attorney, with respect to any stock in its name as might be requested by plaintiff (fol. 47).

5. Prior to September 17, 1929, the date set for payment, United States Electric Power Corporation directed its Transfer Agent and Registrar to make out one certificate in the name of said Benton & Co. for 100,000 shares of stock, and such certificate was thereafter made out and on September 17, 1929, the petitioner paid for said stock at the rate of $13.50 per share and received in return for such payment said certificate for 100,000 shares of stock with warrants attached, registered in the name of Benton & Co. (fols. 15, 16). The certificate was delivered to petitioner, not to Benton & Co. and Benton & Co. never had possession of it.

6. The documentary stamp tax upon the original issue was duly paid and the stamp tax upon the transfer of such stock out of the name of Benton & Co. to third parties was duly paid (fol. 16).

NOTE: References are to pages in Record.

7. In October, 1934, the United States demanded the sum of $4,733.33 as a tax with penalty and interest upon the alleged transfer by the petitioner to Benton & Co. of the right to receive the stock from United States Electric Power Corporation upon the subscription made by the petitioner. Payment of the amount demanded was made under protest and a claim for refund was duly filed and subsequently rejected (Record, fols. 18-21).

The petitioner's claim for a refund is annexed to the complaint marked Exhibit C (Record, p. 20), and in addition to the facts above set forth, alleges that the assessment of the tax was contrary to the decision of the United States District Court for the Western District of Pennsylvania in *Union Trust Company* v. *Heiner*, 26 Fed. (2nd) 391 (1928), upon which petitioner relied in failing to pay the tax upon the alleged transfer to its nominee at the time the stock was issued.

Question Presented

Upon the foregoing facts the question is presented as to whether a corporation which is a subscriber for capital stock, the original issue tax having been duly paid, is liable to pay a transfer tax as well, imposed by Schedule A(3) of Section 800 of the Revenue Act of 1926, where the corporation directs and causes the certificate representing the stock to be issued in the name of its nominee for its convenience in connection with future sales and transfers of stock to the public, when such nominee has neither any right, title, equity, interest, lien, claim or demand whatsoever in such stock, nor possession of the certificates representing the same.

II

Reasons for issuance of the writ.

1. The decision in the instant case by the Circuit Court of Appeals for the Second Circuit, rendered July 6, 1936, is in direct conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit rendered a week previously upon June 30, 1936 in *United States* v. *A. B. Leach & Co.** in an opinion not yet officially reported. The question herein presented has never been passed upon by this court.

2. The decision of the Circuit Court of Appeals for the Second Circuit in the instant case determined a question which is of every-day and constant interest to the business world. Few, if any, corporations hold stock owned by them in their corporate name because when sold such stock is not good delivery, except when accompanied by necessary resolutions of the directors. Therefore, it is common practice for corporations to hold stock in the name of nominees or dummies. That the issuance of stock certificates in the name of a dummy did not require payment of a double stamp tax was squarely determined in *Union Trust Company* v. *Heiner*, 26 Fed. (2nd) 391, in the District Court of the United States for the Western District in Pennsylvania on February 8, 1928. The government did not appeal. In reliance upon the interpretation of the law in that case, thousands of transactions were consummated. The doctrine of that case has been followed in four District Courts of the United States and by the Circuit Court of

*Reported Commerce Clearing House—1936 Federal Tax Service—Vol. 4, p. 10049—¶9388; and Prentice-Hall—1936 Federal Tax Service—Vol. 1 at ¶1362.

Appeals for the Seventh Circuit. The instant case is the only case in which the government has been successful in establishing as taxable an alleged transfer which was non-taxable under the only existing judicial decision at the time it was carried out.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket Calendar No. 282, *Founders General Corporation, Appellant* v. *James J. Hoey, Collector of United States Internal Revenue for the Second District of the State of New York, appellee,* and that the said decision and judgment of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

FOUNDERS GENERAL CORPORATION,
By: ROYAL E. T. RIGGS,
Counsel for Petitioner.